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No. 86-76

In the Supreme Court of the United States

OCTOBER TERM, 1986

BRANCH BANKING AND TRUST COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that banks are not within the "zone of interests" arguably protected by the "common bond" provision of the National Credit Union Act (Act), 12 U.S.C. 1759.

1. Since at least 1977, employees of various municipalities in the State of North Carolina have

sought to establish a credit union that would serve employees and elected and appointed officials of the city and county governments in that state. In January 1983, ten such employees applied to respondent, the National Credit Union Administration (NCUA), for authority to form a federally chartered credit union. Pet. App. 4a. NCUA "conducted an exhaustive investigation into the propriety and viability of the proposed credit union" (*ibid.*) and determined that "the majority of North Carolina municipalities are so small that they could not support credit unions by themselves and that many are 'geographically located where no existing credit union services are available' " (*ibid.* (quoting C.A. App. 294)). NCUA concluded that inclusion of various municipalities within a single credit union was therefore necessary and that the proposed credit union met the Act's chartering standards, and in March 1983 NCUA approved its formation (Pet. App. 4a).

Petitioners, six large commercial banks doing business in North Carolina, then filed this action in the United States District Court for the Eastern District of North Carolina. Petitioners claimed that NCUA's approval of the North Carolina municipal government employees' credit union violated the so-called "common bond" provision of the Act, which provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. Petitioners alleged that the local government employees did not share such a common bond and that allowing them to form a credit union would injure petitioners in their competition with credit unions for depositors, borrowers, and other consumers of financial services.

On cross-motions for summary judgment, the district court dismissed petitioners' complaint (Pet. App. 16a-20a). The court said that the Act's "common bond [provision] is a shield to protect the members of credit unions and not a sword to be seized by potential competitors to challenge the * * * actions of the [NCUA] in granting a charter" (*id.* at 19a). Accordingly, the court held that petitioners were "outside the protected zone of interest contemplated by the * * * Act" (*ibid.*) and thus without standing to challenge NCUA's approval of the credit union's charter.

The court of appeals affirmed (Pet. App. 1a-13a). Applying this Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the court identified the question presented as "whether the banks' interests are arguably within the zone of those protected by the statute" (Pet. App. 8a). After examining the Act's relevant language and legislative history, the court determined that "the general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means" (*id.* at 9a). In particular, the court found that "the common bond provision was designed to ensure the cohesive operation of credit unions" (*id.* at 9a-10a) and that interpreting it to protect the competitive interests of banks would be "at cross purposes with the general goals of the statute" (*id.* at 10a). Thus, the court concluded that "the interests of banks are far removed from the interests of the credit union members protected by these provisions" (*id.* at 9a) and, accordingly, "that

[petitioners] ha[d] failed to meet the requirements of the zone test" (*id.* at 8a).

2. The court of appeals' decision is correct. It is consistent with the decisions of this Court and of the other courts of appeals. The zone of interests question petitioners raise is entirely distinct from that raised in *Clarke* v. *Securities Industry Ass'n*, No. 85-971, since *Clarke* concerns the zone of interests under a different statute, the McFadden Act. Accordingly, further review by this Court is not warranted.

a. As the court of appeals ruled, the banks have standing, in the prudential sense, only if "the banks' interests are arguably within the zone of those protected by the statute" (Pet. App. 8a). It is well established that the "zone of interests" question is essentially an inquiry into "congressional intent" (*Barlow* v. *Collins*, 397 U.S. 159, 164 (1970)). A litigant is within the zone of interests protected by a statute only "[i]f * * * Congress, in enacting [the statute], [arguably] intended to protect" that litigant from the harm of which he complains. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 7 n.7; accord, *Barlow* v. *Collins*, 397 U.S. at 164-165; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. at 153-156. Here, petitioners clearly are not "within the class of persons that the [common bond] provision was designed to protect" (397 U.S. at 155).

The court of appeals correctly determined that the "common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks" (Pet. App. 9a-10a). In 1934, Congress found that the nation's banks were not "mak[ing] credit * * * avail-

able to people of small means" (H.R. Rep. 2021, 73d Cong., 2d Sess. 1 (1934)) and that these individuals needed a financial institution more responsive to their credit needs (see S. Rep. 555, 73d Cong., 2d Sess. 1-2 (1934)). After studying the available alternatives, Congress concluded that a system of "self-managed" and democratically controlled credit unions was the best available mechanism. See S. Rep. 555, *supra*, at 2. The common bond provision was intended to insure that the credit union would be responsive and sensitive to the needs of the membership. See *ibid.*; *La Caisse Populaire Ste. Marie* v. *United States*, 563 F.2d 505, 509 (1st Cir. 1977). It is only one of several provisions that together serve that purpose. See 12 U.S.C. 1760-1761b; H.R. Rep. 2021, *supra*, at 3. In sum, its purpose was "to benefit, support, and strengthen the activity of federal credit unions" (Pet. App. 18a-19a).

At no point did Congress "evidence[] [any] concern to protect or consider the interests of banks" (Pet. App. 3a). To the contrary, as the court of appeals noted, "the general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means" (*id.* at 9a). Thus, the court of appeals clearly did not err in holding petitioners to be outside of the zone of interests protected by this statute.

b. Petitioners' arguments for review by this Court are without merit.

Petitioners' basic claim is that as competitors they have standing to seek to enforce rules limiting credit union formation. See Pet. 11-12. But this Court has flatly rejected competitors' claims that competitive

harms are themselves sufficient to bring a plaintiff within the zone of interests protected by a statute not designed to protect such competitors. "This Court has * * * repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations" (*Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968)). Rather, both the Court and the courts of appeals have found competitive harm to satisfy the prudential requirements of standing only "when the particular statutory provision invoked * * * reflect[s] a legislative purpose to protect a competitive interest" (*id.* at 6; see, *e.g.*, *Bank Stationers Ass'n* v. *Board of Governors of the Federal Reserve System*, 704 F.2d 1233, 1235-1236 (11th Cir. 1983); *Dialysis Centers, Ltd.* v. *Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981); *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 291 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 763 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977)). Petitioners' contrary contention concerning "competitor standing" is simply inconsistent with these cases.

Petitioners' contention (Pet. 13-14) that it is improper to rely on legislative history to resolve "zone of interests" questions finds no support in the decisions of this Court or in the decisions of the courts of appeals.[1] This Court has repeatedly examined legis-

[1] In *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), this Court held that travel agents are within the zone of interests protected by Section 4 of the Bank Service Corporation Act, 12 U.S.C. (1970 ed.) 1864. In so holding, the Court noted that, in its prior decision in *Associaiton of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), holding that data processors are within the zone of interests arguably pro-

lative history in resolving zone of interests questions. See, *e.g.*, *Barlow* v. *Collins*, 397 U.S. at 164-165 & n.7; *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. at 6-7. So have the courts of appeals. See, *e.g.*, *Bank Stationers Ass'n* v. *Board of Governors of the Federal Reserve System*, 704 F.2d at 1236; *Control Data Corp.* v. *Baldrige*, 655 F.2d at 294; *AFGE* v. *Dunn*, 561 F.2d 1310, 1312 (9th Cir. 1977). Indeed, since zone of interests questions are essentially inquiries into "congressional intent" (*Barlow* v. *Collins*, 397 U.S. at 164), it is not surprising that courts often resort to legislative history to resolve such questions. See generally *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (intent of Congress can often be determined only by reference to context of enactment).

Petitioners' suggestion (Pet. 14-15) that the court of appeals' decision cannot be reconciled with the decisions of this Court in *Data Processing*, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971), is in error. In those cases, the Court held that competitors of banks are within the zone of interests protected by the Bank Service Corporation Act and the

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tected by Section 4 of the Bank Service Corporation Act, it "did not rely on any legislative history showing that Congress desired to protect data processors *alone* from competition" (400 U.S. at 46 (footnote omitted; emphasis added)). By this statement, the Court in *Arnold Tours* meant only that there was nothing in the legislative history of the Bank Service Corporation Act to indicate that *only* data processors are within the zone of interests protected by that statute. Petitioners misread the Court's decision when they suggest that the Court intended to hold legislative history irrelevant to "zone of interests" questions. See Pet. 13.

Glass-Steagall Act. The decisions in those cases turned on the Court's judgment that, in those statutes, "Congress had provided competitor standing" (*United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974)); congressional intent was "the crucial factor" (*id.* at 176 n.9). The court of appeals in this case expressly applied the test set forth in *Data Processing*; its decision—that banks are not within the zone of interests that Congress arguably intended the National Credit Union Act to protect—is based on a careful examination of congressional intent and is fully consistent with this Court's decisions.

Finally, petitioners' argument (Pet. 9-10, 15-16) that the decision below raises the same question as, and is in conflict with, the decision of the Court of Appeals for the District of Columbia Circuit in *Securities Industry Ass'n* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985), cert. granted *sub nom. Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Mar. 3, 1986), is defective for similar reasons. In *Clarke*, the District of Columbia Circuit decided that securities brokers are within the zone of interests protected by the McFadden Act (12 U.S.C. 36). The McFadden Act is unrelated to and serves purposes far different from the common bond provision of the National Credit Union Act. Thus, petitioners' claim that the two cases involve similar questions turns, once again, on their assumption that "zone of interests" questions can be detached from their statutory moorings. This Court's "zone of interests" cases clearly reject that assumption. See *Barlow* v. *Collins*, 397 U.S. at 164 ("zone of interests" question is an inquiry into the "congressional intent" of a particular statute); *Brock* v. *Pierce County*, slip op. 7 n.7 (same). The decision below does not conflict with

Clarke, nor is there any reason why this case should be held for that one.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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